Supreme Court, U.S.
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No. 00-606

In The

Supreme Court of the United States

SUMMIT PROPERTIES, INC., *et al.*,

Petitioners,

v.

HOECHST-CELANESE CORPORATION f/k/a CELANESE CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT SHELL OIL COMPANY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners failed to meet the proximate cause requirement for a civil RICO claim this Court prescribed in *Holmes* because Petitioners admittedly did not hear or rely upon the alleged misrepresentations made the basis for their predicate acts of mail and wire fraud.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Petitioners have listed all parties in this proceeding, and there are no further parties that warrant mention.

Respondent Shell Oil Company ("Shell") was previously doing business as Shell Chemical Company. Thereafter, Shell Chemical Company was a wholly owned subsidiary of Shell Oil Company. Effective July 2000, Shell Chemical Company was converted to a Delaware limited partnership now known as Shell Chemical L.P., and the General Partner of Shell Chemical L.P. is Shell Oil Company. Shell Oil Company is a wholly owned subsidiary of Shell Petroleum, Inc., a Delaware corporation. Shell Petroleum, Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by The "Shell" Transport and Trading Company, p.l.c.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

REASONS THE PETITION SHOULD BE DENIED .. 5

I. There Is No Material Conflict Among the Circuits: They Generally Hold That, To Satisfy the Proximate Cause Requirement, a Civil RICO Plaintiff Must Show Detrimental Reliance on the Misrepresentations Made the Basis of His Predicate Mail or Wire Fraud Claims 5

A. Overview 5

B. The Circuits Have Consistently Concluded That Reliance Is Essential to the Proximate Cause Analysis in a Civil RICO Case Based on Mail or Wire Fraud 7

C. There Is No Conflict Among the Circuits Regarding Whether a Civil RICO Plaintiff Must Prove Reliance 13

1. There Is No Conflict With the Second Circuit 13

2. There Is No Conflict With the Third Circuit 15

3. There Is No Conflict With the Fourth Circuit 16

TABLE OF CONTENTS – Continued

Page

4. There Is No Conflict With the Eighth Circuit 17

5. There Is No Conflict With the Eleventh Circuit 19

6. There Is No Conflict With the District of Columbia Circuit 21

II. The Fifth Circuit Correctly Held That Under the Facts of This Case Reliance Was Critical to the Proximate Cause Analysis 22

A. Because of Multiple Intervening Factors There Is No Necessary Direct Relationship Between the Alleged Fraud and Petitioners' Damages 22

B. Other Courts Have Recognized That Directness of Injury Is Required To Avoid the Impossibility of Ascertaining the Amount of An Injury Caused By Fraud Rather Than Other Factors 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

All Care Nursing Service, Inc. v. High Tech Staffing Servs., Inc., 135 F.3d 740 (11th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999) 19

Appletree Square I, Ltd. Partnership v. W.R. Grace & Co., 29 F.3d 1283 (8th Cir. 1994) ..... *passim*

Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986 (8th Cir. 1989) 17, 18

Basic, Inc. v. Levinson, 485 U.S. 224 (1988) 10

BCCI Holdings (Luxembourg), S.A. v. Khalil, 214 F.3d 168 (D.C. Cir.), *cert. denied*, 121 S. Ct. 382 (Oct. 30, 2000) 21

Bieter Co. v. Blomquist, 987 F.2d 1319 (8th Cir.), *cert. denied*, 510 U.S. 823 (1993) 17, 18

Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988) 7, 8, 17

Callahan v. A.E.V., Inc., 182 F.3d 237 (3d Cir. 1999) .. 27, 28

Caviness v. DeRand Resources Corp., 983 F.2d 1295 (4th Cir. 1993) 8

Central Distributors of Beer, Inc. v. Conn, 5 F.3d 181 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994) 9

Chisolm v. TranSouth Financial Corp., 95 F.3d 331 (4th Cir. 1996) 8, 10, 16, 17

County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990) 8, 13, 14, 15, 19

TABLE OF AUTHORITIES – Continued

Page

Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995) 19, 20

Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211 (5th Cir. 1988) 8

Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990) 15, 16, 18

First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995) 27

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) ..... *passim*

Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737 (3d Cir. 1996) 8

John C. Holland Enters. v. J.P. Mascaro & Sons, 653 F. Supp. 1242 (E.D. Va.), *aff'd mem.*, 829 F.2d 1120 (4th Cir. 1987) 16

Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290 (11th Cir. 1998) 9

Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc., 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000) 14, 26

Metromedia Co. v. Fugazy, 983 F.2d 350 (2d Cir. 1992), *cert. denied*, 508 U.S. 952 (1993) 8

Neder v. United States, 527 U.S. 1 (1999) 10

Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991) 9, 19

TABLE OF AUTHORITIES – Continued

Page

Reynolds v. East Dyer Development Co., 882 F.2d 1249 (7th Cir. 1989) 9

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 7

Sizemore v. Georgia-Pacific Corp., 1996 WL 498410 (D.S.C. Mar. 22, 1996), *aff'd mem.*, 114 F.3d 1177 (4th Cir. 1997) 28

Standardbred Owners Ass'n v. Roosevelt Raceway Assocs. L.P., 985 F.2d 102 (2d Cir. 1993) 8, 13, 14

Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) 27

Taffett v. Southern Co., 930 F.2d 847 (11th Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992) 19, 20

United HealthCare Corp. v. American Trade Ins. Co., 88 F.3d 563 (8th Cir. 1996) 17, 18

United States v. Blumeyer, 114 F.3d 758 (8th Cir.), *cert. denied*, 522 U.S. 938 (1997) 10

United States v. Rowe, 56 F.2d 747 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932) 10

STATUTES

18 U.S.C. § 1961-§ 1968 1

18 U.S.C. § 1964(c) 7

OTHER AUTHORITIES

David B. Smith & Terrance G. Reed, Civil RICO ¶ 9.05 (1996) 10

STATEMENT OF THE CASE

This is a "garden variety" state law products liability case that Petitioners have sought to transform into a federal racketeering case. If Petitioners were to prevail on their theory, virtually every products liability case could be brought in federal court–an unprecedented expansion of federal subject matter jurisdiction Congress surely did not intend when it enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961-§ 1968, to combat organized crime. The Fifth Circuit wisely declined to "federalize" products liability law in this fashion. (App. 12a) So should this Court.

Petitioners are owners of apartments and other multi-unit commercial dwellings that filed suit against the Respondents seeking damages for alleged defects in the plastic plumbing systems installed in their buildings. (App. 65a-66a) Respondents Vanguard, Bow, and a subsidiary of Household are manufacturers of the component parts of the plastic plumbing systems. (App. 53a-55a) Respondent Shell manufactured the polybutylene material that the plumbing parts manufacturers extruded to make the plastic plumbing pipe. (App. 52a) Respondents Hoechst-Celanese and DuPont manufactured the acetal material that the plumbing parts manufacturers molded to make the plastic pipe fittings. The Hoechst-Celanese acetal was tradenamed Celcon, and the DuPont acetal, Delrin. (App. 53a)

Petitioners alleged that the plastic pipe and fittings suffered from inherent defects that rendered them unsuitable for use in hot and cold water plumbing systems. (App. 59a-62a) They alleged that over time the plastic plumbing parts degraded in chlorinated water, became brittle, and failed prematurely. (App. 60a) They alleged

that heat and stress at levels found in residential plumbing systems accelerated the degradation process. (App. 62a) Petitioners alleged that, as a result, the plastic plumbing systems in their properties have leaked and caused water damage. (App. 60a) They sought to recover from Respondents the cost of repairing the water damage and replacing the allegedly defective plumbing. (App. 78a) To establish Respondents' liability for their damages, Petitioners alleged conventional products liability theories such as negligence, gross negligence, and strict liability. (App. 66a-70a)

To justify federal subject matter jurisdiction over these state law claims, Petitioners also alleged a violation of RICO. (App. 50a) Petitioners alleged that the Respondents were all members of an "enterprise," the purpose of which was to capture the market for residential and commercial hot and cold water plumbing. (App. 75a-76a) They alleged that the Respondents conducted their enterprise through a "pattern of racketeering activity." (App. 75a-76a) The specific predicate acts of racketeering Petitioners alleged were mail and wire fraud. The mail and wire fraud claims were based on the Respondents' alleged efforts to market the plastic plumbing system to code bodies, builders, developers, plumbers, and other users of plumbing parts. Petitioners alleged that in their promotional activities Respondents used the mails and wires to make various representations about the plastic plumbing system that Petitioners contend were false. (App. 75a-76a)

Significantly, Petitioners did not allege that any of these misrepresentations were ever made directly to them. In fact, they conceded in both the district court and the Fifth Circuit that in purchasing their properties they

did not personally rely on anything Respondents said or published about the plastic plumbing system. (App. 7a, 30a) Similarly, they did not allege that the specific builders and plumbers who installed the plastic plumbing systems in their properties acted in reliance on any misrepresentation made directly to them. Also, they did not allege that the specific code bodies who approved the plastic plumbing system for use in the jurisdictions in which their properties are located acted in reliance on any misrepresentations made directly to them. Rather, Petitioners took the position in both the district court and the court of appeals that under RICO they were not required to allege such individual acts of reliance. (App. 7a) They chose to stand instead on the theory they again bring forward in their Petition–"fraud on the market." (Pet. at 4)

The district court dismissed Petitioners' RICO claim for failure to state a claim on which relief could be granted and declined to exercise supplemental jurisdiction over Petitioners' pendant state law claims on the ground that those were more properly dealt with in the state courts. (App. 33a) The district court noted that "Plaintiffs do not allege that fraudulent communications through mail and wire fraud were directed to them and do not allege that they relied on any of the alleged misrepresentations to third parties." (App. 32a) Based on its review of the civil RICO statute and prior decisions, the district court concluded that "absent an allegation that Defendants made material misrepresentations to Plaintiffs and that Plaintiffs relied on the mail and wire fraud on which the civil RICO claims are predicated, Plaintiffs cannot satisfy the proximate causation requirement for purposes of civil RICO." (App. 32a-33a)

The Fifth Circuit agreed with the district court's analysis. The Fifth Circuit took its cue from this Court's holding in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), that a civil RICO plaintiff must show that the alleged predicate acts of mail or wire fraud were the proximate cause of his injury. (App. 4a) Rejecting Petitioners' contention that they were not required to show reliance on the alleged fraud to satisfy the proximate cause requirement, the Fifth Circuit noted that

> [m]ost other circuits . . . require a showing of detrimental reliance by the plaintiff, which is consistent with *Holmes'* admonition that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation.

(App. 7a-8a) The Fifth Circuit reasoned that causation with respect to a fraud claim was different from causation with respect to a products liability claim. The linkage between a design defect and an injury is between the defect and the injury, but with a fraud claim the linkage is between the defendants' fraud and the injury. (App. 8a) The Fifth Circuit noted that, as a product travels in the stream of commerce, inherent defects are carried with it, but fraudulent statements are not. (App. 8a) The causal connection between a misrepresentation and any subsequent harm vanishes once the product travels beyond the entity who actually relied on the representation when making the purchasing decision. (App. 9a, n.19) The court concluded that, even if intermediary builders, plumbers, code officials, or prior owners relied on the Respondents' alleged misrepresentations when choosing to use or approve the PB plumbing system, that did not indicate whether the Respondents' fraud proximately caused the

Petitioners' injuries. (App. 9a, n.19) That is because, unlike products liability theories, fraud addresses liability between persons with direct relationships. (App. 8a-10a) Finally, the Fifth Circuit rejected Petitioners' effort to rely on the securities law concept of "fraud on the market" to satisfy the proximate cause requirement in a product defect context. (App. 11a) Therefore, the Fifth Circuit affirmed the district court's dismissal of Petitioners' RICO claim. (App. 12a)

REASONS THE PETITION SHOULD BE DENIED

I. There Is No Material Conflict Among the Circuits: They Generally Hold That, To Satisfy the Proximate Cause Requirement, a Civil RICO Plaintiff Must Show Detrimental Reliance on the Misrepresentations Made the Basis of His Predicate Mail or Wire Fraud Claims.

A. Overview

The consequences to the federal court system of the proposition Petitioners advance would be devastating. This case is no different than any other products liability case. Here, a plastic plumbing system allegedly proved to be unsuitable for the use for which it was intended. It allegedly failed prematurely, leaked, and caused property damage as well as economic losses to the owners of the buildings containing the plumbing system.

To make a RICO case out of leaking plumbing, Petitioners have focused on the marketing of the plumbing system. They claim that in promoting the sale of the plastic plumbing system, the Respondents made various misrepresentations about the quality and characteristics of the plumbing. (App. 56a-66a) However, as the Fifth Circuit noted, in nearly every products liability case the

seller undoubtedly published marketing materials touting the merits of its product. (App. 12a) If the product turns out to be defective, then those marketing materials may be labeled "fraudulent." Petitioners' theory is that they can sue to recover the damages incurred by reason of a defective product under a RICO mail or wire fraud theory without showing that they ever heard or saw the seller's marketing claims for its product, much less relied upon them. (App. 21-23) If so, there is nothing to distinguish this case from any other products liability case in which the seller of an allegedly defective product has promoted the sale of its product, and all such products liability cases can be brought in federal court under RICO. As the Fifth Circuit properly concluded, Congress could not have intended such a "federalization" of the states' laws of products liability–laws that no one has ever contended are inadequate to address the issue of dangerous or defective products. (App. 12a)

Contrary to Petitioners' argument, the circuits are not in material conflict with respect to the fundamental deficiency in Petitioners' complaint. Since this Court's decision in *Holmes*, every circuit court that has addressed the question has held that, to satisfy the proximate cause requirement, a civil RICO plaintiff alleging mail or wire fraud must show detrimental reliance upon the alleged misrepresentations. To try to manufacture a split among the circuits on this issue, Petitioners have distorted the holdings of cases or relied on inapposite cases involving other predicate acts in which reliance is not an issue. Therefore, Petitioners' claim of conflict among the circuits is wrong and represents no reason for this Court to grant the writ.

B. The Circuits Have Consistently Concluded That Reliance Is Essential to the Proximate Cause Analysis in a Civil RICO Case Based on Mail or Wire Fraud.

A civil RICO plaintiff may recover damages only if he shows that he has been "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985). Thus, as the district court below noted, a civil RICO claim has three separate and distinct elements: (1) a predicate act [§ 1962 violation], *i.e.*, mail or wire fraud; (2) proximate causation ("by reason of"); and (3) injury to the plaintiff's business or property. (App. 31a); *see also Brandenburg v. Seidel*, 859 F.2d 1179, 1187, 1188 n.10 (4th Cir. 1988). This Court has construed the "by reason of" language to incorporate the traditional requirements of proximate causation or legal causation, as opposed to mere factual or "but for" causation. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992). In other words, "[c]ausation principles generally applicable to tort liability must be considered applicable" in RICO cases. *Brandenburg*, 859 F.2d at 1189.

Proximate causation is a judicial mechanism to limit liability under civil RICO to those who are *directly* injured by the RICO violation. *See Holmes*, 503 U.S. at 268-69. The primary consideration in determining proximate cause is the directness of the relationship "between the injury asserted and the injurious conduct alleged." *Id.* at 268. The purpose of the proximate causation limitation is to preclude recovery by those who complain "of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts." *Id.* After all, RICO does not " 'shield every injury; not does it insure against every

wrong that can be traced to, [as opposed to 'flow from,'] a predicate act.' " *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1218 n.15 (5th Cir. 1988) (citing *Sedima*, 473 U.S. at 496-97).

Following the proximate causation guidelines articulated in *Holmes*, the courts of appeal have universally required a showing of detrimental reliance on the predicate acts of mail or wire fraud to ensure the existence of a direct relationship between the injury and the alleged RICO violation.

> SECOND CIRCUIT: *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs. L.P.*, 985 F.2d 102, 105 (2d Cir. 1993); *Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir. 1992), *cert. denied*, 508 U.S. 952 (1993) ("In the context of an alleged RICO predicate act of mail fraud, we have stated that to establish the required causal connection, the plaintiff was required to demonstrate that the defendant's misrepresentations were relied on."); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311-12 (2d Cir. 1990).
>
> THIRD CIRCUIT: *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3d Cir. 1996) (detrimental reliance was a necessary component in civil RICO claim predicated on mail and wire fraud).
>
> FOURTH CIRCUIT: *Chisolm v. TranSouth Financial Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Caviness v. DeRand Resources Corp.*, 983 F.2d 1295, 1305 (4th Cir. 1993) (dismissing RICO claim where there was no evidence that the plaintiffs relied on an allegedly fraudulent placement memorandum in making their decision to purchase oil and gas wells); *Brandenburg*, 859 F.2d at 1188-90 (civil RICO plaintiffs who base their claims on predicate acts of mail or wire fraud must allege that

they detrimentally relied on the fraudulent statements).

SIXTH CIRCUIT: *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994) (a RICO claim is not actionable unless a fraudulent statement was made to the plaintiff and the plaintiff detrimentally relied on the statement).

SEVENTH CIRCUIT: *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1253-54 (7th Cir. 1989) (home buyers did not rely on any omission to disclose soil problems and, therefore, could not recover under RICO for that failure to disclose).

EIGHTH CIRCUIT: *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994) ("In order to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts.")

ELEVENTH CIRCUIT: *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) (court denied plaintiff's civil RICO claims because the alleged misrepresentations were made to third parties and plaintiff did not rely on them); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-500 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991) ("when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme.")

This Court has denied petitions for writ of certiorari in all of these cases in which they have been sought.

The rationale for requiring detrimental reliance in a civil RICO claim premised on mail or wire fraud is axiomatic–"a showing of reliance on the predicate act of

fraud ensures the existence of a 'direct relation between the injury asserted and the injurious conduct alleged.' "[1] *Chisolm*, 95 F.3d at 337 (quoting *Holmes*, 503 U.S. at 268). This Court has held in the securities fraud context that "[r]eliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Basic, Inc. v. Levinson*, 485 U.S. 224, 243 (1988). As the commentators David Smith and Terrance Reed have noted, "[i]mposing a burden on a civil RICO plaintiff to prove justifiable reliance as a necessary means of demonstrating causation is entirely consistent with the Supreme Court [decision] in *Basic*." David B. Smith & Terrance G. Reed, Civil RICO ¶ 9.05, at 9-57 (1996).

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[1] Petitioners cite this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), for the proposition that the element of reliance has no place in the federal mail and wire fraud statutes. (Pet. at 21-22) In *Neder*, however, this Court was discussing what was required to prove the *crime* of mail or wire fraud. It is well-accepted that a conviction under the mail and wire fraud statutes does not depend on whether anyone was actually defrauded. *See United States v. Blumeyer*, 114 F.3d 758, 767-68 n.6 (8th Cir.), *cert. denied*, 522 U.S. 938 (1997). Therefore, a person can be convicted of mail or wire fraud even if no one ever actually relied on the fraudulent statements.

Recovery of damages under the civil RICO statute is a different matter. As this Court noted in *Neder*, " '[c]ivilly of course the [mail fraud statute] would fail without proof of damage, but that has no application to criminal liability.' " 527 U.S. 25 (citing *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932)). The Fifth Circuit's holding in this case does not involve an examination of mail and wire fraud–the underlying crime alleged–but of proximate causation, which is a distinct and separate element of a civil RICO violation.

Petitioners do not allege that Respondents made any misrepresentations to them regarding the plastic plumbing system or that they relied on any such misrepresentations in deciding to purchase the properties containing the plastic plumbing system. (App. 7a, 30a) In addition, Petitioners do not allege that Respondents made any specific misrepresentations to the code officials in the specific jurisdictions in which their properties were located or that those code officials made any decisions based on the allegedly misleading statements. Similarly, they fail to allege that Respondents made any specific misrepresentations to the builders who built their properties or that those builders chose to install PB plumbing systems in those properties as a result of any such misrepresentations. Thus, all Petitioners have is a general claim that the Respondents' marketing materials were false, but no allegations that the misrepresentations had any direct impact on anyone in the actual chain of events involved in the development, construction, and acquisition of their buildings. Given these facts and given the prior decisions set forth above, no other circuit would have decided this case any differently than the Fifth Circuit.

Indeed, the Eighth Circuit has reached the same result in a case strikingly similar to this one. In *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283 (8th Cir. 1994), the plaintiff sued to recover the cost of removing asbestos-containing fireproofing material installed in its commercial office building. *Id.* at 1284. In addition to state law claims, the plaintiff brought a civil RICO claim based on predicate acts of mail and wire fraud. *Id.* at 1286. The Eighth Circuit held that, to establish injury to the plaintiff's business or property "by

reason of" the mail and wire fraud, the plaintiff "must establish detrimental reliance on the alleged fraudulent acts." *Id.* The plaintiff admitted that the defendant manufacturer of the fireproofing material never made any misstatements about the material specifically to it or that it relied on any alleged misrepresentations in purchasing the building. *Id.*

Instead, the plaintiff attempted to establish detrimental reliance through a "fraud on the market" theory. The plaintiff argued that if the defendant "had disclosed to the 'marketplace' the hazards associated with [the fireproofing material], [plaintiff] would not have purchased a building containing [the fireproofing material] or at least would have negotiated a lower purchase price for the building." *Id.* at 1287. Like the Fifth Circuit here, the court in *Appletree* flatly rejected the fraud on the market theory:

> Courts generally have limited the use of the fraud-on-the-market theory to securities fraud cases. The theory permits a plaintiff to establish a rebuttable presumption of reliance based upon the premise that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." . . . The theory does not apply to [plaintiff's] case because the presumptions underlying the theory are not present. The real estate market, unlike the stock market, is not a well-developed market in which the price of a building reflects all publicly available information. Thus, [plaintiff] cannot employ the fraud-on-the-market theory to establish detrimental reliance.

Id. at 1286 (citation omitted). Because the plaintiff did not show that it detrimentally relied on any of the alleged

misrepresentations in its purchase of the building, the Eighth Circuit held that the plaintiff failed to establish that the alleged misrepresentations proximately caused its claimed injuries, and thus, lacked standing to bring its civil RICO claims. *Id.*

C. There Is No Conflict Among the Circuits Regarding Whether a Civil RICO Plaintiff Must Prove Reliance.

Despite the litany of cases clearly requiring reliance on alleged mail or wire fraud in civil RICO cases, Petitioners have attempted to manufacture a "conflict" among the circuit courts where none exists.[2] To do this, Petitioners rely in part on decisions that were decided before this Court emphasized in *Holmes* that recovery under civil RICO includes a traditional proximate cause element. In addition, many of the cases cited by Petitioners are bribery cases, which are factually distinguishable from the predicate acts of mail or wire fraud at issue here. Finally, some of the cases on which Petitioners rely simply do not support the proposition for which they are cited.

1. There Is No Conflict With the Second Circuit.

Petitioners contend that two Second Circuit opinions support their theory of a conflict among the circuit courts: *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990); and *Standardbred Owners Ass'n v.*

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[2] Petitioners concede that the Fifth Circuit's opinion in this case is in harmony with the rule prevailing in the Sixth and Seventh Circuits. (Pet. at 23-24)

Roosevelt Raceway Assocs. L.P., 985 F.2d 102 (2d Cir. 1993). (Pet. at 13-14)

Contrary to Petitioners' assertion, the court in *Standardbred* followed a traditional reliance approach to proximate causation. In *Standardbred* the plaintiffs alleged that the defendants falsely represented to them that they intended to continue harness racing at Roosevelt Raceway. Acting in reliance on these fraudulent statements, the plaintiffs purchased equipment and made other expenditures for the purpose of racing horses at the Raceway. The Second Circuit held that plaintiffs had standing under civil RICO to recover these "fraudulently induced" damages. 985 F.2d at 104-05.[3] That result is completely consistent with the Fifth Circuit's opinion in this case.

Suffolk is also a reliance case. In *Suffolk* the plaintiff ratepayers alleged that the defendant utility made unduly optimistic predictions about the construction status and costs of a nuclear power plant which it was building and thereby caused the New York Public Service Commission ("PSC") to grant the utility unwarranted and excessive rate increases. 907 F.2d at 1300. The Second Circuit affirmed a j.n.o.v. in favor of the defendant on the plaintiffs' civil RICO claims. *Id.* at 1301. The Second Circuit held that, to satisfy the proximate cause requirement of *Holmes*, it was necessary for the plaintiffs to establish that the defendant's misrepresentations to

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[3] The Second Circuit itself has agreed that its decision in *Standardbred* was based on the plaintiff's reliance on the alleged fraud. *See Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 237-38 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000).

PSC were relied upon by the PSC, and that such misrepresentations caused the defendant's rate increase to be granted. *Id.* at 1311. The Second Circuit held that the plaintiffs' RICO claims failed because their evidence was insufficient to establish the required causal connection. *Id.* at 1311-12.

The holding in *Suffolk* is consistent with the Fifth Circuit decision here. The only difference is that, under the peculiar facts of that case pertaining to utility ratemaking, the court in *Suffolk* apparently would have allowed the reliance of the PSC to suffice. That difference, however, is immaterial to this case because Petitioners also did not allege that any specific intermediary involved with their properties–code officials, builders, or plumbers–ever heard or relied upon any alleged misrepresentation by the Respondents. Therefore, this case would be an inappropriate vehicle for the Court to address the issue whether the reliance requirement can be met by the reliance of a third party.

2. There Is No Conflict With the Third Circuit.

For the supposed conflict between the Fifth Circuit's opinion and the Third Circuit, Petitioners rely on *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990). (Pet. at 8-9) However, *Environmental Tectonics* preceded this Court's decision in *Holmes*. As a result, it does not analyze the proximate cause issue in the manner prescribed by *Holmes*.

Moreover, *Environmental Tectonics* was a bribery case, not a fraudulent misrepresentation case. The plaintiff alleged that, as a result of a competing bidder's bribery of a public official, the plaintiff lost the bid for a military

procurement contract. 847 F.2d at 1067. The causation analysis in such a bribery case is obviously different than in a fraud case. In a bribery case the target of the bribe is not a victim and cannot bring a civil RICO suit. Therefore, it is necessary to go further down the causal chain to identify the person who has been wronged and is, therefore, the proper plaintiff in a bribery case. In the bribery context the person wronged is the rival bidder who lost the contract. The requisite causal connection in such a case is not reliance, but whether the bribery of the official caused the plaintiff to lose the bid. Thus, a bribery case such as *Environmental Tectonics* says nothing about whether the Third Circuit requires reliance to establish proximate cause in a civil RICO claim premised on fraudulent misrepresentations.

3. There Is No Conflict With the Fourth Circuit.

Petitioners argue that two decisions in the Fourth Circuit are "squarely in conflict" with the Fifth Circuit's opinion here: *John C. Holland Enters. v. J.P. Mascaro & Sons*, 653 F. Supp. 1242 (E.D. Va.), *aff'd mem.*, 829 F.2d 1120 (4th Cir. 1987); and *Chisolm v. TransSouth Fin. Corp.*, 95 F.3d 331 (4th Cir. 1996). (Pet. at 14-16)

But the unpublished *John C. Holland* opinion certainly does not represent the position of the Fourth Circuit on the proximate cause issue. The district court examined only whether the plaintiff had established the requisite elements of the predicate act of mail and wire fraud. 653 F. Supp. at 1242. Perhaps because the case preceded *Holmes*, the district court never analyzed the proximate cause element of a civil RICO claim. The plaintiff thereafter voluntarily dismissed its civil RICO claim. 1987 WL

38095, at *1. As a result, the Fourth Circuit's unpublished opinion does not address *any* RICO issue, much less proximate cause. *Id.*

Petitioners' argument that *Chisolm* squarely conflicts with the Fifth Circuit's decision here is completely specious. In fact, in *Chisolm* the Fourth Circuit noted that in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988),

> We said that, where the predicate act giving rise to civil liability under RICO was alleged to have been mail fraud, prospective plaintiffs must, in order to demonstrate their standing to sue, plausibly allege both that they detrimentally relied in some way on the fraudulent mailing and that the mailing was a proximate cause of the alleged injury to their business or property.

95 F.3d at 337 (citations and footnote omitted). In *Chisolm* the Fourth Circuit also reaffirmed that "where fraud is alleged as a proximate cause of injury, the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation." *Id.* Thus *Chisolm* is entirely consistent with the Fifth Circuit's opinion in this case.

4. There Is No Conflict With the Eighth Circuit.

Petitioners argue that three decisions in the Eighth Circuit are "at odds" with the Fifth Circuit's opinion here: *Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986 (8th Cir. 1989); *Bieter Co. v. Blomquist*, 987 F.2d 1319 (8th Cir.), *cert. denied*, 510 U.S. 823 (1993); and *United HealthCare Corp. v. American Trade Ins. Co.*, 88 F.3d 563 (8th Cir. 1996). (Pet. at 9-11)

However, *Atlas Pile Driving* was decided before this Court's admonition in *Holmes* that a civil RICO plaintiff's

injuries must be proximately caused by the predicate act of mail or wire fraud. The *Atlas Pile Driving* opinion contains no discussion of the proximate cause requirement in a RICO claim. Rather, the decision in *Atlas Pile Driving* is limited to whether the plaintiffs had sufficiently established predicate acts of mail or wire fraud. 886 F.2d at 990-93.

Similarly, the only discussion of reliance in *United HealthCare* involved the issue of whether reliance is required to prove the predicate act of mail or wire fraud, which it unquestionably is not. 88 F.3d at 571 & n.5. The court did not discuss reliance in connection with the proximate cause element of a civil RICO claim because the defendant did not seek to challenge proximate cause on the basis of non-reliance. The defendant argued instead that the plaintiff had not been injured at all because he had in fact received the insurance coverage for which he paid premiums. The court found that the plaintiff had not received insurance coverage, and thus, had been injured by reason of the defendants' misappropriation of the plaintiff's insurance premiums. *Id.* at 572.

Finally, *Bieter*, like *Environmental Techtonics*, involved bribery of a public official, rather than fraudulent misrepresentations. As previously noted, the causation analysis in a bribery case is fundamentally different from a fraud case. Therefore, *Bieter* does not say anything about whether the Eighth Circuit requires a showing of reliance in fraudulent misrepresentation cases. On the other hand, when the Eighth Circuit subsequently spoke directly to that issue in *Appletree*, it said squarely that "to establish injury to business or property 'by reason of' a predicate

act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts." 29 F.3d at 1286.

5. There Is No Conflict With the Eleventh Circuit.

Citing *Pelletier*, Petitioners concede that "in simple, two-party misrepresentation cases" the Eleventh Circuit, like the Eighth Circuit, follows a reliance requirement similar to that of the Fifth Circuit. 921 F.2d 1465 (11th Cir. 1991). (Pet. at 12) Nevertheless, they argue that three cases in the Eleventh Circuit are in "square conflict" with the Fifth Circuit opinion: *Taffett v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992); *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995); and *All Care Nursing Service, Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740 (11th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999). (Pet. at 11-12) This is a strange group of cases on which Petitioners rely.

First, *All Care Nursing Service* acknowledges the rule in *Pelletier* that reliance is required "to the extent that a RICO plaintiff must prove he was injured by reason of the RICO defendant's deception and fraud." 135 F.3d at 745 n.10. The court simply held that there was no argument that the injury was inadequately shown. *Id.*

In *Taffett*, like *Suffolk*, plaintiff ratepayers contended they had paid higher utility rates as a result of fraudulent misrepresentations which the defendants allegedly made to local rate-making agencies. To create the supposed conflict in *Taffett*, Petitioners rely on the panel opinion reported at 930 F.2d 847. However, the Eleventh Circuit

granted rehearing en banc and vacated the panel's opinion. 958 F.2d 1514. Upon rehearing, the court held that under the "filed rate doctrine" the plaintiff ratepayers had suffered no legally cognizable injury. As a result, the court never reached any proximate cause issue. 967 F.2d 1483. This Court denied the plaintiffs' petition for writ of certiorari. 506 U.S. 1021 (1993). Thus, *Taffett* does not conflict with the Fifth Circuit's decision.

Finally, *Cox* is another bribery case. Union members brought a RICO action against the union and their employer alleging that union negotiators had agreed to concessions in a collective bargaining agreement in exchange for pension payments to which they were not entitled. As in all bribery cases, reliance by the union members was not the issue in the causation analysis. Instead, the court held that

> the element of causation is satisfied if the Union negotiators were influenced to make any amount or degree of concessions in the subsequent rounds of negotiations by their desire to convince the Company to agree to their outstanding illegal request coupled with the Company's failure to reject the pension request from the beginning.

17 F.3d at 1400. Thus, the causation analysis in *Cox* focused on whether the bribes paid to the union negotiators caused the union contract to be less favorable to union employees than it would have been in the absence of the bribes. The court held that because the plaintiffs produced evidence that the bribes caused concessions in the collective bargaining agreement, they met their burden of establishing proximate cause. *Id.* at 1403. *Cox* says nothing about the proximate cause analysis in a case involving allegedly fraudulent misrepresentations.

6. There Is No Conflict With the District of Columbia Circuit.

Petitioners argue that the Fifth Circuit's proximate cause analysis was "squarely rejected" by the District of Columbia Circuit in *BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d 168 (D.C. Cir.), *cert. denied*, 121 S. Ct. 382 (Oct. 30, 2000). (Pet. at 17)

However, the *BCCI* case is clearly distinguishable because of the nature of the RICO allegations. *BCCI* involved a scheme to allow BCCI secretly to acquire ownership of First American Bank in violation of the United States banking laws. BCCI's management agreed to pay the defendant large sums of money in exchange for the defendant's consent to act as the nominee shareholder of First American on behalf of BCCI. 214 F.3d at 170. The RICO action was brought by the liquidators of BCCI. The damages that the district court awarded the liquidators consisted largely of the various monies that BCCI paid to the defendant and affiliated companies in return for the defendant's participation in the nominee stockholder scheme. *Id.* at 171.

The District of Columbia Circuit affirmed the district court's finding that these damages were proximately caused by the RICO violation. *Id.* at 174. The court did not discuss reliance in the context of the civil RICO claim because, due to the particular character of the RICO violation, reliance was not an issue. BCCI had clearly lost the money paid to the defendant as a result of the RICO violations. The one exception was $62,021,193 in silver and copper trading losses. The District of Columbia Circuit held that there was no evidence those losses were traceable to the use of the defendant's name, as opposed to market conditions. *Id.* This is consistent with the Fifth

Circuit's approach that, where multiple intervening factors exist, there must be evidence directly linking the alleged fraud and the plaintiff's injuries. Thus the *BCCI* decision represents no conflict with the Fifth Circuit.

II. The Fifth Circuit Correctly Held That Under the Facts of This Case Reliance Was Critical to the Proximate Cause Analysis.

In addition, whether reliance is or is not always required, the courts below clearly reached the right result in this case. While Petitioners have argued that reliance is a sufficient, but not a necessary, means of showing proximate cause, they have never shown by what other means they met the proximate cause requirement under the specific facts of this case. This case involves a chain of decisionmaking through which the alleged fraud had to pass–including code bodies, builders and plumbers, and the purchasers of the properties in question. Obviously at each level in the chain multiple factors could go into making the relevant decision. Under the facts of this case it would be virtually impossible to conceive of a theory of proximate cause that does not include some type of reliance. In the absence of reliance this case presents precisely the situation in which this Court in *Holmes* indicated proximate cause was lacking.

A. Because of Multiple Intervening Factors There Is No Necessary Direct Relationship Between the Alleged Fraud and Petitioners' Damages.

In the absence of reliance there is no necessary causal connection between the alleged fraud in this case and Petitioners' injury. Here Petitioners allege that Respondents made false marketing claims about the qualities of

the plastic plumbing system. However, before the alleged fraud could be said to have had any impact on Petitioners, it had to pass through at least three different levels in the distribution chain:

(1) A code body had to decide to approve the plastic plumbing system for use in its jurisdiction;

(2) A developer, builder, or plumbing contractor had to decide to purchase and install the plastic plumbing system in a particular building; and

(3) Petitioners had to decide to purchase the building containing the plastic plumbing system.[4]

Each of these steps required an independent decision based on many factors. Whether the alleged fraud proximately caused Petitioners' injuries depends on the knowledge, conduct, and decisionmaking processes of these independent actors.

There is no necessary direct relationship between the Respondents' allegedly fraudulent marketing claims and the conduct and decisions of these intervening actors. For example, it is possible that the code body authorities: (1) conducted an independent evaluation of the Respondents' marketing claims; (2) obtained opinions from other experts in the plumbing industry; and (3) decided that while they did not believe the Respondents' marketing

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[4] Notably, Petitioners themselves never purchased the allegedly defective plumbing system. Instead, they purchased apartment complexes and other commercial buildings in which the plumbing systems were purchased and installed by a third party.

claims, nevertheless the plastic plumbing system had sufficient advantages to warrant making it available to interested users. Similarly, it could be that developers, builders and plumbing contractors: (1) made their own evaluation of the plastic plumbing system; or (2) relied on their own prior successful use of the product; or (3) relied on the advice of other builders or contractors who had successfully used the product; and (4) recognized that, contrary to the Respondents' marketing claims, the plastic plumbing system was not as good as copper, but considered that to be outweighed by its lower cost and ease of installation. It is further possible that Petitioners: (1) purchased the building after having the plumbing inspected; (2) knew that the building contained the plastic plumbing system; (3) understood that it might wear out faster than copper, and, if so, would have to be replaced; but (4) nevertheless found the price of the building sufficiently attractive to go ahead with the purchase. The multiplicity of other possible intervening causes makes reliance critical to a finding of proximate cause in this case. The only way Petitioners could negate the existence of these other causal factors–and establish the necessary direct connection between the Respondents' allegedly false marketing claims and their injury–is to show that they heard and relied on the alleged fraud.

Indeed, in the absence of reliance, this case presents many of the problems that led this Court in *Holmes* to insist that the alleged RICO violation be the proximate cause of the plaintiff's injuries. One is the difficulty of ascertaining the amount of the plaintiff's damages attributable to the RICO violation, as distinct from other independent factors. 503 U.S. at 269. In the absence of reliance, there is no way to determine to what extent

Petitioners' damages were due to the alleged mail or wire fraud, as distinct from other possible intervening decisions and actions.

Another problem this Court highlighted in *Holmes* was the difficulty of apportioning damages among plaintiffs removed at different levels of injury from the RICO violations so as to avoid multiple recoveries. *Id.* In this case, there are clearly different levels in the chain of distribution at which injury could conceivably have been sustained. Petitioners themselves acknowledge the damages also suffered by the builders and plumbers who purchased and installed the plastic plumbing system and who, if the system is defective, may be required to repair or replace it. (Pet. at 20) In the absence of reliance–establishing a direct link between the alleged violation and Petitioners' injuries–the problem of apportioning damages among these different plaintiffs would be very complicated.

Finally, as this Court observed in *Holmes*, the need to grapple with these problems is unjustified since there are other "directly injured victims" who can themselves bring suit. *Id.* Petitioners allege that Respondents defrauded developers, builders, and plumbers into purchasing and installing the plastic plumbing system in their buildings. If we credit Petitioners' fraud theory,[5] those parties are indisputably the direct victims of the alleged fraud. When the plastic plumbing system proved defective, they could have been required to repair or

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[5] In this case, however, Petitioners alleged fraud only on the building market in general. They failed to allege that the specific builders and plumbers who installed the plastic plumbing system in Petitioners' properties ever heard or relied upon any alleged misrepresentations.

replace the system, suffered damages to their professional reputations, and been subject to suit by the ultimate purchasers of the buildings. Those injuries would be ample incentive to sue.

As this Court cautioned in *Holmes*, allowing civil RICO suits like this one "would open the door to 'massive and complex damages litigation' which would not only burden the courts, but would also undermine the effectiveness of treble-damages suits." *Id.* at 274.

B. Other Courts Have Recognized That Directness of Injury Is Required To Avoid the Impossibility of Ascertaining the Amount of An Injury Caused By Fraud Rather Than Other Factors.

Under similarly attenuated circumstances in which there are multiple intervening factors, other courts have held that the difficulty of apportioning the degree of the plaintiff's injury caused by the alleged wrongful conduct, as opposed to other factors, suggests a lack of requisite proximate causation.

For example, in *Laborers Local 17 Health and Benefit Fund v. Phillip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000), the Second Circuit examined civil RICO claims by labor union health and welfare trust funds against tobacco companies and held that, because the claims were indirect, they did not meet the proximate causation requirement.

> [T]he damage claims here are incredibly speculative. It will be virtually impossible for plaintiffs to prove with any certainty: (1) the effect any smoking cessation programs or incentives would have had on the number of smokers

> among the plan beneficiaries; (2) the counter-effect that the tobacco companies' direct fraud would have had on the smokers, despite the best efforts of the Funds; and (3) other reasons why individual smokers would continue smoking, even after having been informed of the dangers of smoking and having been offered smoking cessation programs.

Id. at 239-40; *see also Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 921 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000).

Likewise, in *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995), the plaintiff brought a RICO claim alleging that the defendants misrepresented the value of real estate pledged as collateral to induce the plaintiff to make non-recourse loans to the defendants. The Second Circuit affirmed the dismissal of the claim on the ground that the plaintiff failed to establish proximate causation. The court wrote that when factors other than the defendant's fraud are an intervening direct cause of a plaintiff's injury that same injury cannot be said to have occurred by reason of the defendant's actions. *Id.* at 769. The deficiency in the plaintiff's claim was that it could not show its losses were attributable to the alleged fraud, as distinct from other factors such as the general decline in the New York real estate market.

The Third Circuit also addressed the proximate causation issue in *Callahan v. A.E.V., Inc.*, 182 F.3d 237 (3d Cir. 1999). In *Callahan*, a small beer distributorship alleged that the defendant had acquired more beer distributorships than Pennsylvania law allowed by making false statements to the liquor control board and that, as a result

of his illegal acquisition of a large number of distributorships, he was able to extract from wholesalers substantial discounts not available to smaller competitors. The Third Circuit affirmed the district court's dismissal of the RICO claims, in part, because of the difficulty in ascertaining the market advantages and profits obtained by the defendant due to fraud on the liquor control board, as opposed to the defendant's negotiating ability, size of his individual stores, the operating methodology of his stores, or other legitimate actions. *Id.* at 264.

Here Petitioners assert a similarly attenuated factual scenario in which Respondents' marketing efforts allegedly induced local and national code bodies, developers, homebuilders and plumbers to approve or install certain plumbing components in buildings that Petitioners later purchased. However, it is indisputable that code officials and regulatory agencies necessarily use a complex mix of inputs and judgments when adopting a particular code or regulatory decision. *See Sizemore v. Georgia-Pacific Corp.*, 1996 WL 498410, at *9 (D.S.C. Mar. 22, 1996), *aff'd mem.*, 114 F.3d 1177 (4th Cir. 1997). Likewise, commercial real estate builders and developers utilize myriad factors in making business decisions about which products to use on construction projects. Obviously the purchaser of an apartment building makes his decision based on a variety of different factors. In the absence of an allegation that they relied on the alleged fraud, Petitioners' allegations in this case are simply too indirect and speculative to show causation because of the multiple other factors that may have caused the plastic plumbing system to be present in the properties Petitioners eventually purchased.

CONCLUSION

No conflict among the circuit courts exists with respect to the issue in question: all maintain that in civil RICO cases based on alleged mail or wire fraud reliance is essential to satisfy the proximate cause requirement of *Holmes*. Moreover, whether or not reliance is always required, the Fifth Circuit was clearly correct in its holding that, under the facts of this products liability case, Petitioners could not maintain their civil RICO claim in the absence of an allegation that the Respondents' allegedly fraudulent statements were made directly to them and that they relied upon them in purchasing their properties. Any other rule would make RICO an avenue for bringing all state law products liability cases in federal court–which was surely not the purpose and intent of the RICO statute.

Respectfully submitted,

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